

### **REMARKS**

Favorable reconsideration of this application, as amended, and in light of the following discussion is respectfully requested. Claims 13-14, 16-17, 19-20, 23, 26-28, 31, 34-37, 40, 42-43, 54-90, 97-102, and 106-128 are now pending. Claims 13, 14, 16, 17, 19, 20, 23, 26-28, 55-90, 97-102, 106, and 107 have been amended. No new matter is added by those amendments. Claims 127 and 128 have been added, support for which can be found in claims 13 and 23, as previously presented, as well as in the specification at, for example, paragraphs [002], [004], and [041].

### **Restriction Requirement**

In the Final Office Action dated March 22, 2006, claims 13 and 23, as well as the claims that depend therefrom, have for the first time been restricted from the remaining claims. The Office takes the position that the claims as previously presented, which include the mechanical beverage dispenser, constitute an invention that is independent and distinct from the beverage itself. Thus, the Office held those claims non-elected by original presentation. Applicants respectfully traverse the restriction requirement.

As an initial matter, claims 73-81 and 82-90 have been improperly restricted as they depend from claims 31 and 37, respectively, which were not themselves restricted. Thus, at a minimum, the Office should properly consider those claims. Next, even though the Office holds claims 13, 14, 16, 17, 19, 20, 23, 26, 55-102, and 106-111 non-elected by original presentation, claims 55-111 are nonetheless included in the first substantive rejection. That inconsistency foretells the improper basis for the restriction.

Regarding the merits of the restriction, however, the Office sets forth no basis upon which the claimed inventions are considered “independent and distinct.” The Office indicates that the restricted claims are subject to different classification and that they further include a mechanical feature. While separate classification may be an indication of separate status in the art, and thus goes to the issue of burden, it does not address the separate requirement of distinctness. In fact, the Office only asserts that the restricted claims are independent and distinct from the other pending claims because they relate to an “apparatus”; however, the mere inclusion of a mechanical feature does not change the fundamental nature of the invention and does not indicate that those claims recited distinct subject matter from the remaining claims.

Specifically, prior to the amendment that resulted in the current restriction requirement, claims 13 and 23 were directed to, *inter alia*, frozen carbonated and non-carbonated beverages that use a beverage syrup having a freezing point depressant in order to render the beverage in a slush state that is capable of being dispensed from a mechanical dispensing device. *See* Amendment dated February 3, 2006. Both claims specifically recited that the beverage was for use in this environment, *i.e.*, with a dynamic or mechanical dispenser. *See id.* The Office did not agree that those claims as written were limited to an environment in which a mechanical beverage dispenser was used. Thus, in the last amendment, Applicants specifically recited that the beverage was used in combination with a mechanical dispenser having a mixing chamber. *See id.*

Even assuming *arguendo* that the various inventions recited in the pending claims are themselves distinct, there is no burden in examining all the claims as

presented. The search necessary to determine the patentability of a beverage specifically for use in a mechanical dispenser is necessarily coextensive with a search for the combination of a beverage and a mechanical dispenser. The issue may relate to the form of the claim, but does affect the search as the fundamental character of the invention has not changed. Of course, without showing a serious burden for the joint consideration of the pending claims, the Office cannot properly maintain the restriction requirement. See MPEP § 808.

Applicants have herein again amended claims 13 and 23 to recite a "dispenser system" that comprises, *inter alia*, the beverage syrup. Newly added claims 127 and 128 further comprise the mechanical dispenser in combination with the beverage. Thus, to the extent claims 13 and 23 are generic to the combination and were previously examined in this application, new claims 127 and 128 to the specific subcombination must be proper. Applicants strongly contend that the search for a beverage for use in a mechanical dispenser is coextensive with a search directed to a beverage in combination with a mechanical dispenser, thus revealing the lack of any burden on the Office to examine all of the pending claims. Accordingly, withdrawal of the outstanding restriction requirement and examination of all pending claims is earnestly solicited.

#### **Rejections Based upon Stefandl**

The Office has rejected claims 31, 34-37, 40, 42, 43, 54-102, 106-112 and 115-126 under 35 U.S.C. § 103(a) as obvious over Stefandl in view of Beyts. Stefandl is alleged to teach a freezer-altering additive for a composition made from a carbohydrate,

glycerol, or propylene glycol and a sugar alcohol such as sorbitol or erythritol. The freeze-altering composition is simply added to a bottle and the bottle is tossed in the freezer to form a slush beverage. The Office concedes that Stefandl differs from the claimed inventions, which include both the use of a high intensity sweetener in the product and a sugar alcohol as a sweetener. Therefore, Beyts is added to address those deficiencies. This rejection is respectfully traversed.

The pending claims recite, *inter alia*, a beverage for use with a mechanical dispenser, a dispenser system comprising the beverage, the combination of a beverage and a mechanical dispenser, and a method for controlling the freezing point of a beverage making it capable of being dispensed from a mechanical dispenser. Contrary to the position taken by the Examiner, recitation of less than the specific combination of a dispenser and a beverage is not merely an intended future use that may be dismissed for the purposes of patentability.

In the instant invention, the environment in which the beverage is dispensed is a physical limitation on the beverage since the beverage must be capable of being dispensed from a mechanical dispenser. As Applicants have discussed at length in their prior responses, a composition that is capable of freezing under home freezer conditions is not the same as a composition that can be dispensed from a mechanical dispensing device. Nothing within Stefandl or Beyts teaches or suggests that the beverage syrups disclosed therein are appropriate for dispensing from a mechanical dispenser having a mechanical mixing chamber.

The Office dismisses the environment as not being important when, in fact, it goes to the very heart of what Applicants discovered. As disclosed and claimed,

Applicants produced a beverage syrup from a mixture of a high-potency, non-caloric sweetener and a low-caloric sugar that is dispensable from a mechanical dispensing device. The prior art does not teach or suggest such a result. Contrary to the Examiner's conclusion, the skilled artisan would not have expected a beverage that could freeze in a home freezer to be appropriate for use in a mechanical mixing device, since the freeze conditions are so different. A home freezer results in static freeze conditions, where liquids and other products merely sit and slowly lower in temperature until frozen. The mechanical mixing devices and chambers of the present inventions, however, provide dynamic freeze conditions under which the liquids and other products may be agitated while lowering in temperature. The mixing naturally does work upon the liquids and other products and, according to basic physics, that work generally results in temperature increases as it is performed. Yet the mechanical mixing devices and chambers still result in a frozen product and are able to dispense that product. Those differences, as well as abundant others, highlight aspects of the present inventions that patentably define the pending claims over the cited prior art.

As neither Stefandl nor Beyts teach or suggest a beverage capable of being dispensed from a dispenser including a mechanical mixing chamber, withdrawal of this ground of rejection is respectfully requested.

**Rejections based on Marulich**

Claims 31, 34-37, 40, 42, 43, and 112-126 have been rejected under 35 U.S.C. § 103(a) as obvious over Marulich in view of Beyts, and in some instances in further

combination with one or more of Cole, DeCock, and Anderson. The Office maintains those rejections for the reasons of record.

As discussed above, Applicants disagree with the Office's characterization of the claims as addressing only an intended future use of the product or, in the event that they address the combination, that they are no longer considered to be the same invention. Marulich, like Stefandl, is concerned with the production of slush beverages in a home freezer. For all of the reasons of record and those discussed above, there is no suggestion that the beverage of Marulich, even as modified by Beyts, Cook, DeCock, or Anderson, would be capable of being dispensed from a mechanical mixing dispenser. Since Marulich, alone or in combination with the other cited references, does not teach a beverage capable of being dispensed from a mechanical dispenser, withdrawal of this ground of rejection is respectfully requested.

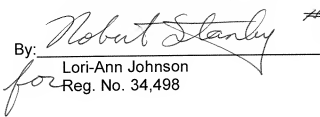
### **Conclusion**

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,  
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